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**DATIA Member Survey on Part 40**

DATIA has identified the following eight items from DOT's December 9, 1999 NPRM revising its drug and alcohol testing regulations (49 CFR Part 40) as requiring a response on behalf of the testing industry. Review each item, and answer the series of questions that follow it. DATIA will address each item in its industry response based upon the majority opinion received on each question. **Complete the survey, and return it to DATIA by January 31, 2000.** Responses should be faxed to (703) 519-1716. Surveys may also be mailed to DATIA, 1600 Duke St., Ste. 220, Alexandria, VA 22314.

**1. Public Interest Exclusions (PIES) [Sections 40.361-40.385]**

The **NPRM** is proposing a new section creating a public interest exclusion to sanction a "service agent" for non-compliance with Part 40 requirements, rather than sanctioning the employer using a service agent whom is non-compliant. A PIE would be a directive **from** DOT to its regulated employers to not use a service agent that fails **or refuses** to provide its services as required under Part 40. DOT contemplates using this process only in cases having considerable significance; not **for** minor mistakes. DOT **offices** would utilize this process only after having exhausted other means to resolve the problem. The PIE hearing process would be done in private by DOT and all decisions made by DOT **officials**.

- a. Do the normal open legal and judicial system's procedures (where the service agent could be fined or charged with an offense such as fraud) have more safeguards and procedural objectivity than a private DOT procedure?  
☐ Yes ☒ No
- b. Should DOT consider allowing other service agents such as consortia, third party administrators, collectors, etc., to set and enforce their own industry developed and accepted standards that would permit only those service agents meeting certification standards to be allowed to provide DOT mandated testing services?  
☐ Yes ☐ No
- c. In your view, does the DOT proposal make it clear what could constitute serious non-compliance versus a minor mistake?  
☒ Yes ☐ No
- d. Should DOT consider the BAT certification process as a model program that could be adapted for other service provider certification?  
☒ Yes ☐ No
- e. Should DOT consider using a panel of drug and alcohol testing industry experts to review possible Part 40 violations by service agents to determine if they are, in fact, significant or minor, with DOT providing an appropriate response based on the industry panel's recommendation?  
☒ Yes ☐ No
- f. Do you believe that such an industry advisory panel would be more open and objective than a private DOT proceeding?  
☒ Yes ☐ No
- g. In your view, would the PIE provision become bogged down with disputes among industry competitors reporting each other for "serious violations" when economic factors (lost business, retaliation, etc.) were the real issue?  
☒ Yes ☐ No
- h. Should DOT allow a complaint from an industry competitor to be sufficient enough to initiate a PIE?  
☐ Yes ☒ No

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**2. Service Agent Assurance [Section 40.11]**

The DOT recommends a new provision that calls **for** both regulated employers and their service agents to sign a contract provision committing them to compliance with Part 40 **provisions**.

- a. Do you believe that a service agent contract will serve to ensure accountability and quality of service between ~~industry~~ professionals and their customers?  
☐ Yes ☒ No
- b. Should such a contract be required, as the DOT proposes?  
☐ Yes ☒ No

**3. Role of Consortia and Third Party Administrators [Sections 40.97(a), 40.157, & 40.351(e) & (f)]**

The **NPRM proposes** that **MROs** be required to report **all** drug test results directly, and only, to actual employers, and not to an intermediary, such as a consortium or **third party** administrator (**C/TPA**). DOT believes that the use **of** intermediaries has the potential to delay the transmission **of results** and increase the likelihood **of** administrative error. This approach is based on DOT's 1995 guidance relative to the role **of C/TPAs**, and suggests that reporting through an intermediary might be appropriate in certain specific circumstances (e.g. when use **of** a third party is the only practical way to direct an owner-operator to cease performing **safety** sensitive **functions**, or to report a violation to a DOT agency **for** the purpose **of** taking license or certification action following a violation.) DOT is reluctant to extend these provisions any farther.

One exception to this proposal exists. DOT agencies would be permitted to have regulation authorizing the provision **of** results through an intermediary. Currently, only the U.S. **Coast** Guard has such a regulation.

- a. Would this provision remove key **C/TPA** functions and valued added services your program currently provides to clients?  
☐ Yes ☒ No
- b. In your experience, are **MROs** able to provide the employers value-added services that go along with a test result, such as information on removing an employee following a positive result, follow-up programs, reporting to an agency, etc.?  
& Yes ☐ No
- c. In your experience, are **MROs** sufficiently knowledgeable on modal (FAA, Coast Guard, **FTA**, etc) specific procedural issues posed by an employer in response to receiving drug test results; questions that are **accurately** answered by the **C/TPA**?  
☒ Yes ☐ No
- d. In your experience, do small businesses usually (50 persons or less) have the resources available to provide a dedicated Designated Employer Representative to receive and act upon test results from the **MRO** in a timely fashion?  
☒ Yes ☐ No
- e. In your experience, is an **MRO** available frequently enough to properly report all drug tests, both positive and negative, to the employer in a timely fashion?  
☒ Yes ☐ No
- f. Would you support a possible **DATIA** proposal where **C/TPAs** would be allowed to receive negative results from the **MRO** on behalf of the employer, and allow the **MRO** to report confirmed positive results simultaneously to the employer and the **C/TPA**?  
☒ Yes ☐ No
- g. Would you support a possible **DATIA** proposal to allow **C/TPAs** to receive and report all confirmed test results for small employers of 10 or fewer employees, and not require direct **MRO** reporting to these small companies?  
☒ Yes ☐ No
- h. Do you believe that allowing the **C/TPA** to act as the "agent of the employer" in receiving both positive and negative test results is:  
☐ Not Important ☒ Neutral ☐ Somewhat Important ☐ Very Important

**4. Drug Testing Forms and Materials [Sections 40.47 and 40.49]**

DOT is proposing to prohibit use of a DOT drug testing form for a non-DOT test, or vice versa. In addition, collectors must use a testing kit conforming to DOT requirements. Finally, DOT is questioning whether additional security measures are needed for testing materials and supplies.

- a. In your experience, would a universal chain of custody form (CCF) with a check box to indicate whether a "Federal" or "Non-Federal" test was being performed address this concern and not compromise the integrity of DOT mandated tests?  
☒ Yes ☐ No
- b. Would a universal CCF lessen the chance of a staff person completing the inappropriate form for the test being performed?  
☒ Yes ☐ No
- c. Would the requirement to use a testing kit conforming to DOT standards help to ensure proper and consistent collection procedures?  
☒ Yes ☐ No
- d. Are the current measures used to secure testing materials and supplies adequate?  
☒ Yes ☐ No
- e. Are you aware of any instances of widespread tampering with, or theft of, testing materials or supplies?  
☐ Yes ☒ No

If yes, please provide specific examples: \_\_\_\_\_

**5. Collector and MRO Training [Sections 40.33 and 40.123]**

The DOT is proposing that collectors be required to read and understand DOT rules and guidance concerning collections, demonstrate proficiency by completing three consecutive error-free trial collections, and receive retraining as needed. DOT also proposes requiring those individuals training or evaluating participants in the testing process to be "**sufficiently** knowledgeable" about testing requirements and procedures. In this proposal, **MROs** would be required to take a training course every two years or certify that they have reviewed and understand Part 40 and applicable DOT agency regulations and guidance.

- a. Do you believe that implementing training requirements for collectors and **MROs** will serve to increase the integrity and quality of drug tests by further reducing the chances of error?  
☒ Yes ☐ No
- b. Will such training allow collectors and **MROs** to remain current of changing regulations and technologies?  
☒ Yes ☐ No
- c. To ensure the quality of the training being received by collectors, should some sort of standard training and certification process for the trainer be required?  
☒ Yes ☐ No
- d. Could adequate training be considered something as simple as reviewing current videotape or written training material on appropriate procedures, followed by a test?  
☒ Yes ☐ No

**6. Conflict of Interest Provision [Sections 40.101, 40.125]**

DOT is concerned about any potential for **conflicts** of interest with all service agents. DOT is also concerned with what limitations, if any, should be placed upon laboratories and **MROs** serving as third party administrators. DOT has a long-standing prohibition against the laboratory and the **MRO** having an affiliation or financial arrangement with one another that may be construed as a conflict of interest. DOT questions whether this prohibition should be strengthened. DOT also asks how can it ensure there exists no **conflict** of interest in a laboratory-based third-party administrator's selection of an **MRO** or an **MRO-based** third-party administrator's selection of a laboratory.

- a. Have you encountered a specific situation where you believe that a real conflict of interest existed between the **MRO** and a Laboratory?  
☐ Yes ☒ No

*Conflict of Interest Provision continued from previous page*

- b. Have you encountered a specific situation where you believe that a real **conflict of interest** existed between the **MRO** and a Consortium/Third Party Administrator?

☐ Yes ☒ No

## 7. **Adulterants** [Sections 40.91 & 40.93]

The **NPRM** *proposes* to mandate testing for adulterated and substituted specimens (nitrites, *pH*, *creatinine* and, in some cases, *specific* gravity), which will likely increase the number of situations in which labs determine that a specimen has been adulterated or substituted. Specimens found to have been tampered with will be reported to the employer as a *refusal* to test.

- a. In your experience, have **adulterants** and other attempts to tamper with specimens brought into question the integrity and quality of services provided by the testing industry to its customers?

☐ Yes ☒ No

- b. Are the additional *costs* associated with an **adulterants** test panel outweighed by the positive *benefits* for the employer and the general public?

☐ Yes ☐ No

## 8. **Electronic Records and Signatures**

The **NPRM** does not include any new proposals addressing electronic records and signatures. However, DOT is willing to consider ideas that would, to a greater degree than is now the case, permit the use of electronic records and signatures in the program. As you know, the U.S. Dept. of Health & Human Services (**HHS**) has jurisdiction over approving the acceptance of electronic forms (e.g. Federal **CCF**).

- a. Will the use of e-forms and e-signatures streamline the collection process and increase the accuracy of the information provided on these forms?

☒ Yes ☐ No

- b. Will electronic media reduce administrative and storage costs?

☒ Yes ☐ No

- c. Is the testing industry advanced enough to warrant considering the use of e-forms and e-signatures?

☐ Yes ☐ No

- d. Should DOT and **HHS** work cooperatively to permit the optional use of e-forms and e-signatures within three (3) years?

a Yes ☐ No

Thank You,

Please fax to **DATIA** at (703) 519-1716